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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 338

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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IN THE

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No.

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Jack B. Tenney, The Senate Fact-Finding Committee on Un-American Activities, a Cali-

fornia Legislative Committee, Hugh M. Burns, Nelson S. Dilworth, Fred H. Kraft, Louis G. Sutton and Clyde A. Watson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered on the 30th of June, 1950. (R. 147; 183 F. (2d) 121.)

The United States Court of Appeals for the Ninth Circuit reversed the judgment of the District Court of the United States, in and for the Northern District of California, dismissing the complaint of respondent (R. 125) insofar as it related to petitioners.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Court of Appeals has reversed the judgment of the District Court, dismissing the action brought by the respondent insofar as it relates to petitioners for the failure of the complaint to state a cause for relief.

The complaint of respondent (R. 3-74) sought to recover from petitioners, all of whom were duly elected and qualified members (State Senators) of the State Senate of California, and from Elmer E. Robinson, who was and is the Mayor of San Francisco, California, a defendant but not a petitioner, damages in the amount of $250,000 for alleged violation of his civil rights under and by virtue of the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A.

Summarizing the complaint, it appears that respondent sued under Sections 43 and 47(3) of Title 8

U.S.C.A. to recover damages for alleged violations of his civil rights. The defendants (petitioners) are members of what was known as The Tenney Committee of the California State Senate, empowered by a resolution adopted in 1947 to inquire into un-American activities. The remaining defendant is Mayor Robinson of San Francisco.

The pleading avers: "On January 28, 1949, plaintiff (respondent) *circulated a petition* entitled: 'A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)' among the members of the Legislature of the State of California at the State Capitol in Sacramento. * * * and the purpose of said *petition,* as also stated therein, was that the California Legislature should not appropriate further funds for The Tenney Committee. While plaintiff (respondent) was engaged in circularizing said petition as aforesaid for approximately a period of two (2) hours, a subpoena was served upon him ordering him to appear as a witness at a hearing before The Tenney Committee in Sacramento, California, on the following day, to wit: January 29, 1949."

The petition and the subpoena are made parts of the complaint and appear respectively on pages 18 and 22, Tr.

It is to be noted that pursuant to a requirement of the State Constitution the Legislature adjourned for a period of thirty (30) days, commencing at 3:00 p.m. on January 29, 1949, and, hence, was in recess at the time fixed for respondent's appearance.

The petition goes on to charge that the Committee had "used" appellant "as an instrument to smear Congressman Franck R. Havenner as a "Red" when he was candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with The Tenney Committee to this end." The particulars of the charge are lengthy. While respondent was engaged in circulating his protest a subpoena was served upon him directing him to appear as a witness before the Committee on the following day, January 29, at three o'clock in the afternoon. He appeared at that time with his counsel. The Attorney General's Office of the State of California was present, being represented by J. Francis O'Shea, Assistant Attorney General of the State of California, and A. C. Morrison, Deputy Legislative Counsel of the California State Legislature was also present, each of whom advised the Committee during the hearing. Upon being sworn as a witness, respondent gave his name, residence and occupation and then stated to the Committee that he was represented with counsel and would like to act under his advice. Counsel for respondent then commenced to read a copy of the so-called protest above referred to. Thereupon counsel for respondent stated objections to the Committee.

One of the grounds of the objection was that "The purpose of such questions has not been disclosed to Mr. Brandhove and the same are not for a legislative purpose or in aid of legislation." Other grounds were

that respondent had been subpoenaed because of the charges made in his petition to the Legislature; that the Committee was not and could not be a fair and impartial tribunal; that it was engaged in a political and not a legislative investigation in attempting to acquit itself of respondent's charges; that a joint committee of the Assembly and Senate was the only proper body to investigate such charges; and that the Committee had itself vouched for respondent's veracity by releases and reports in the past. The objections were overruled by the Chairman, but respondent was instructed by his counsel not to respond to questioning. The Chairman then inquired of respondent, "Is it going to be your conduct that you are not going to answer any questions presented to you by the Committee?"; to which the answer was, "On advice of counsel, I will not, no, sir."

The witness thereupon answered questions relating to his signature to the so-called protest, and then was further interrogated in connection with his acquaintanceship with certain people, to all of which questions he declined to answer. A motion was made to hold the witness in contempt. Thereupon the Chairman of the Committee referred to an affidavit of respondent of December 9, 1946, which appeared in the Committee's 1947 report, in which affidavit respondent among other things admits being a former member of the Communist Party, and specifically that he was induced to become a member of the Communist Party by Frank McCormick and Hugh Bryson in San Francisco, and after joining the Communist Party he car-

ried out Communist activities. Reference was made to other activities of respondent in connection with evidence presented to the Committee. The Chairman thereupon stated for the record that Brandhove had a criminal record, in the course of which he recounted crimes with which he said respondent had been charged in various cities over a period ranging from 1930 to 1947, including, among other things, charges of sodomy, grand theft, burglary, malicious mischief, and defrauding an inn-keeper. This statement is alleged in the complaint to have been false.

Reference was then made by the Chairman to other affidavits made by respondent and to a newspaper article in which one of the affidavits referred to by the Chairman had been characterized by a Mr. Nicholson as "a tissue of lies" and could be so proven.

The respondent was then asked if he was acquainted with Congressman Havenner's secretary. He refused to answer on advice of counsel. He was then asked, "Does the Army Transport Service in San Francisco have a record of your activities?" Again respondent refused to answer on advice of counsel. The interrogation of respondent was then dropped and the witness was permitted to leave the stand. At the same hearing the Mayor of San Francisco Robinson was called and testified at length in repudiation of the charges Brandhove had made against him which appeared in his so-called protest (appearing in R. 18).

During the course of the session the Committee resolved that a complaint be filed in the proper court charging respondent with a misdemeanor in refusing

to answer questions. This course was followed and appellant was arrested on a complaint preferred by the Chairman and was confined in jail from February 1 to February 15, 1949. A trial of the charge before a jury on March 5, 1949, resulted in a disagreement, and the case was dismissed four days later on motion of the district attorney.

Respondent's complaint pieces together these proceedings and incidents, plus the sending by the Committee of two telegrams to the district attorneys of San Francisco and Alameda counties. They refer to Brandhove's charges circulated among the legislators and to sworn testimony of Brandhove earlier given before the Committee, said in the telegrams to be inconsistent or at variance with the charges. The officials addressed are urged to charge Brandhove with perjury or to have the matter presented to the grand jury of their respective counties.

The pleading then alleges (R. 8) that respondent had committed no public offense at said Committee hearing on the grounds that the resolution creating the Tenney Committee if read into a criminal statute is in violation of the 14th Amendment of the Constitution of the United States for want of certainty; that said hearing on January 29, 1949 was not held for a legislative purpose; that said hearing was held for the purpose of suppressing the free exercise of constitutional rights of respondent, to wit, his rights of free speech and to petition the legislature freely for redress of grievances; that the conduct of said hearing was in violation of due process of law in that

the purpose or object of said hearing was not disclosed to respondent, and in that said hearing was not held in a fair and impartial manner as required under the 14th Amendment of the Constitution of the United States and as also expressly required under the resolution creating the Tenney Committee; that the questions asked of respondent at said hearing were not material and proper as required by Section 9412 of the California Government Code.

The pleading goes on to allege that the acts of petitioners above set forth were done or participated in by said petitioners with malice and intent to intimidate and silence respondent and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law, and so did intimidate, silence, deter, and prevent and deprive respondent.

The complaint then charges that the acts of these petitioners were done under color of the authority conferred upon them by the Constitution of the State of California and the California Senate resolution adopted thereunder creating said Committee.

Allegations in respect to damage concluded the complaint.

We are indebted to the opinion of the Circuit Court of Appeals in a large part for the present summarization of the complaint.

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Sec. 1254(1) of Title 28 U.S.C.A. (Judicial Code and Judiciary), which in its pertinent language provides:

> "Cases in courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The date of the judgment of the Court of Appeals herein sought to be reviewed was June 30, 1950 (R. 147).

III.

THE QUESTIONS PRESENTED.

Petitioners present to this Court the question of whether the Court of Appeals was in error in failing to affirm the judgment of the District Court in dismissing the complaint of respondent. The specific question of law here presented may be stated as follows: Does the complaint in the present action state a cause of relief under the Civil Rights Act? This question may only be answered by considering and correctly determining:

(a) Does the judiciary have the power to inquire into the motives of the legislative branch of the State Government?

(b) Does the Constitution of the United States secure to the respondent a right to petition the Legislature of the State of California?

(c) Is the State Legislature of the State of California and its members liable to damages under the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A. when acting in discharge of their duties as state legislators?

IV.

STATUTES INVOLVED.

Section 43, 8 U.S.C.A.:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 47(3), 8 U.S.C.A.:

"If two or more persons in any State or Territory conspire * * *, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or

Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

V.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. Certiorari should be granted because the Court of Appeals in the instant case has decided an important federal question in a way probably untenable and in conflict with applicable decisions of this Court, namely, that the judiciary has not the power to inquire into the motives of the Legislative Branch of the Government in the following cases:

McGrain v. Daugherty, 273 U.S. 135;
Marshall v. Gordon, 243 U.S. 521;
McCray v. United States, 195 U.S. 27;
Olsen v. State of Nebraska, 313 U.S. 236;
Amy v. City of Watertown, 130 U.S. 301, 319;
Soon Hing v. Crowley, 113 U.S. 703, 710;
New Orleans v. Warner, 175 U.S. 120.

2. Certiorari should be granted because the Court of Appeals in the instant case decided an important question and has rendered a decision probably untenable and in conflict with the decision of other United States Courts of Appeals to the effect that the judiciary has not the power to inquire into the motives of the Legislative Branch of the Government:

Dennis v. United States, 171 F. (2d) 986;
Eisler v. United States, 170 F. (2d) 273;
Townsend v. United States, 95 F. (2d) 352;
Hearst v. Black, 87 F. (2d) 68.

3. The Court of Appeals in the instant case has rendered a decision which conflicts with its own decision in the following cases:

Allen v. Markham, 156 F. (2d) 653, 660;
Alpers v. City and County of San Francisco, 32 Fed. 503.

4. Certiorari should be granted because the Court of Appeals reversed the trial Court upon the important question of whether the right to petition a state legislature on a matter purely of state concern is a right guaranteed under the Constitution and laws of the United States. The decision of the Circuit Court on this subject is probably untenable and in conflict with the weight of authority.

5. Ceritorari should be granted because members of the State Legislature are not liable in damages for acts done in discharge of their duties as State Legislators.

Kilbourn v. Thompson, 103 U.S. 168, 201;

2 *Cooley's Constitutional Limitations,* 8th Ed. p. 929;

Cushing, *Law and Practice of Legislative Assemblies,* Section 5602;

Constitution of the United States, Article IV, Section 4.

6. Certiorari should be granted because of the importance of the problem in the administration of the Civil Rights Act and the orderly administration of state government.

PRAYER FOR WRIT.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Ninth Circuit, commanding the Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals in the case numbered and entitled on its docket No. 12430, William Patrick Brandhove, Appellant v. Jack B. Tenney; the Senate Fact-Finding Committee on Un-American Activities, a California Legislative Committee; Hugh M. Burns; Nelson S. Dilworth; Fred H. Kraft; Louis G. Sutton; Clyde A. Watson and Elmer E. Robinson, Appellees, to the end that this cause may be reviewed and determined by this Court as provided by statutes of the United States; and that the judgment of the said Court of

Appeals be reversed by this Court, and for such other and further relief as may be proper.

Dated, San Francisco, California,
September 25, 1950.

HAROLD C. FAULKNER,
WILBUR F. MATHEWSON,
MELVIN, FAULKNER, SHEEHAN & WISEMAN,
FRED N. HOWSER,
Attorney General of the State of California,
C. J. SCOTT,
Assistant Attorney General of the State of California,
RALPH N. KLEPS,
J. D. STRAUSS,
A. C. MORRISON,
Attorneys for Petitioners.

Certificate of Counsel

I hereby certify that I am one of the petitioners' attorneys in the above entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 25, 1950.

Harold C. Faulkner,
Attorney for Petitioners.

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Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit rendered on June 30, 1950 appears on page 137 of the Transcript of Record, also 183 F. (2d) 121.

II.

JURISDICTION.

The petitioner adopts the reasons stated in the petition for writ of certiorari (pages 11-13 hereof) as supporting the jurisdiction of this Court.

III.

STATEMENT OF THE CASE.

The petitioners adopt the "Summary statement of the matter involved", appearing in the petition for writ of certiorari (pages 2-9 hereof) as a statement of the case for the purposes of this brief.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals erred in reversing the judgment of the District Court.

2. The Court of Appeals erred in holding that the complaint stated a claim for relief under the provisions of Section 43 and 47(3) of Title 8 U.S.C.A.

3. The Court of Appeals erred in holding that the judiciary may inquire into the motives of the Legislature of the State of California and of its committees while acting in the discharge of their duties as such.

4. The Court of Appeals erred in holding that acts of a legislative committee of the Legislature of the

State of California lawful in and of themselves, when tested by the laws of the State of California and of the United States, may constitute an abuse of power because of the motives of the members of the committee.

5. The Court erred in holding that the conduct of the petitioners deprived respondent of a federally protected right.

6. The Court of Appeals erred in holding that the provisions of Sections 43 and 47(3) of Title 8 U.S.C.A. applied to the official acts of the legislative committee of a State Legislature.

7. The Court of Appeals erred in holding that the circulation of a petition by a citizen of the State of California among members of the Legislature of the State of California seeking to induce the Legislators not to appropriate funds for a legislative committee was a right, privilege or immunity secured to the citizen of the State by the Constitution and laws of the United States.

8. The Court of Appeals erred in holding in effect that the complaint charges that the respondent was deprived of a right, privilege or immunity secured to him by the Constitution and laws of the United States, when the right, privilege or immunity, if existent theretofore, admittedly had been exercised by respondent.

V.

ARGUMENT.

In reversing the decision of the District Court, the Court of Appeals has rendered a decision, the rationale of which and the effect of which in the case rendered may permit a Court or a jury to speculate upon what the motives of a committee of a state legislature may have been at the time its members were acting in the discharge of their duties as state legislators. It must be borne in mind that the Court of Appeals has indicated that the present Committee was a legally constituted committee, that it had the power to inquire of the respondent on the subjects concerning which inquiry was made, and that it had the power to inquire of Brandhove on the subject of the charges contained in his petition to the Legislature. Having reached its conclusion in these respects, petitioners claim the case should have ended. The Court of Appeals went a step further and held that if the actions of the Legislature are such that they show a motive to punish the respondent for having exercised a federally protected right, its conduct thus becomes actionable.

The present case further poses this question, the importance of which to the administration of state government is obvious. Are legislators to continue to be answerable for acts within their power and authority only to the people, or are they henceforth to be compelled to defend themselves in Court against attack from persons claimed to be aggrieved in the denial of federally protected rights admittedly exercised by conduct of state legislators within the scope

of their power on a mere allegation that they were actuated by malice and intent to intimidate? To illustrate: Are the members of a state legislature to be hereafter liable in damages because they voted for the passage of a statute at a later time declared unconstitutional because an aggrieved person claimed the legislator was actuated by malice in his vote?

The Civil Rights Statute was never enacted for the purpose of permitting a cause of action for damages under the facts and circumstances of this case. Construction which would so hold should be avoided.

The case presents fundamental questions of constitutional law pertaining to the relationship between the Federal and State governments and to the respective powers of the Courts and the Legislature.

This is a case of first impression in the following respects:

This is the first case in which it has been held that the right to petition a state legislature is a right secured to the citizen by the Constitution of the United States.

This is the first case in which it has been held that the lawfulness or unlawfulness of legislative acts depends solely upon the motive of the members of the legislature.

This is the first case in which a citizen of a state who has exercised his right as a citizen of the state to petition a state legislature with respect to a purely state matter has asked for and, by the ruling of a Court has obtained, the intervention

of a United States Court to compel state legislators to justify their conduct and answer in damages for conduct in the performance of their lawful functions.

A.

THE JUDICIARY HAS NOT THE POWER TO INQUIRE INTO THE MOTIVES OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT.

The Court of Appeals declares:

"* * * a jury or judge may conclude from the showing that the Committee did no more than make legitimate use of the power conferred upon it. The questions put to appellant, taken by themselves, seem to be unobjectionable, and they bear substantial relation to the general subject the Committee was empowered to inquire into. In these inquiries, too, it is possible to discern a purpose on the Committee's part of determining whether sworn information appellant had formerly given the Committee might still be relied on as true, or whether it should now be disregarded as false. We think, also, that the Committee, had it seen fit to do so, might with propriety have questioned appellant relative to the charges he had made against it. The California Court has held that when the integrity of a legislative body, or of its members, is impugned it may lawfully inquire into the subject matter. And there is a state statute making it a misdemeanor for a person summoned as a witness before a legislative committee to refuse to answer material and proper questions."

The court or jury, if this case is required to go to trial, must under this decision in reaching a conclusion on whether the petitioners did more than make legitimate use of the power conferred upon it, pass upon and determine its motives. It appears from the complaint and from the opinion of the Court of Appeals that the Committee was exercising a lawful power in a lawful manner. The only basis upon which a contrary conclusion could be reached is that the Court may inquire into the motives of the members of the Committee. This, we respectfully urge, the Court acting with judge or jury is not permitted to do under the law.

The creation of the Committee was within the constitutional powers of the Legislature.

Vern Smith v. The People of the State of California, 336 U.S. 957.

It has been held uniformly in many cases to be hereinafter cited that the Federal Courts have no power to inquire into the motives of committees created by Congress once it has been determined that the committees were created within the constitutional powers of the Congress and the scope of the inquiry of the Committee did not exceed the limits set by a possible legislative purpose.

If it be suggested that the cases to be cited are dissimilar because they do not involve the Civil Rights Acts it should be noted at the outset that the Court in this case and the Courts in the cases to be cited were all asked to find the action of the committees unconstitutional because their actions infringed upon the

right of individuals secured by the First Amendment of the Constitution.

In the cases to be cited the prohibitions of the First Amendment were applied directly, that is, to the direct action of Congress. In this case the prohibitions of the First Amendment are still sought to be applied not directly but by virtue of the provisions first of the Fourteenth Amendment and secondly, of the Civil Rights Acts. Thus, the power of the Court to inquire into the motives of the legislative committee is no greater than the power of the Court to inquire into the motives of the Committee created by Congress.

In *Dennis v. United States*, 171 F. (2d) 986, 988 the Court stated:

> "Once the rule has been established that the creation of the Committee was within the constitutional powers of the Congress (as has been well established by the three cases noted supra), it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution."

In the case of *Eisler v. United States*, 170 F. (2d) 273, 278 the Court stated:

> "During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appel-

lant was 'to harass and punish him for his political beliefs * * * and that the Committee acted for ulterior motives not within the scope of its or Congress' powers.' The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the motives of Congress or one of its committees."

Although the Court did not cite any authority for the propositions quoted above the Court will observe that both the *Dennis* and *Eisler* cases were decided by the United States Court of Appeals, District of Columbia and in both cases the Court consisted of Associate Justices Clark, Prettyman and Proctor. Previous to the decision of the Court in the *Dennis* and *Eisler* cases the same Court with Associate Justices Clark, Prettyman and Edgerton had decided the case of *Barsky v. United States,* 167 F. (2d) 241, 250, in which case the Court stated:

"Appellants press upon us representations as to the conduct of the Congressional Committee, critical of its behavior in various respects. Eminent persons have stated similar views. But such matters are not for the courts. We so held in *Townsend v. United States,* citing *Hearst v. Black.* The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and perti-

nency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and administrative, from liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity, within the respective powers of the legislature and the executive."

In the *Townsend* case cited by the Court (*Townsend v. United States*, 95 F. (2d) 352, 361, the Court stated:

"Because a witness could not understand the purpose of a cross-examination, he would not be justified in leaving a courtroom. The orderly processes of judicial determination do not permit the exercise of such discretion by a witness. The orderly processes of legislative inquiry require that the committee shall determine such questions for itself. *Within the realm of legislative discretion, the exercise of good taste and good judgment in the examination of witnesses must be entrusted to those who have been vested with authority to conduct such investigations.* Hearst v. Black, 66 App. D.C. 313, 87 F.2d 68. A witness may exercise his privilege of refusing to answer questions and submit to a court the correctness of his judgment in so doing, but in the event he is mistaken as to the law it is no defense, for he is

bound rightly to construe the statute. Sinclair v. United States, supra, 279 U.S. 263, at page 299, 49 S.Ct. 268, 273, 73 L.Ed. 692. Beyond this, he must conform to the procedure of the committee and respond to its questions. McGrain v. Daugherty, supra, 273 U.S. 135, at pages 175, 176, 47 S.Ct. 319, 329, 71 L.Ed. 580, 50 A.L.R. 1. He cannot be heard to plead justification and, hence, lack of ~~willfulness~~ in defiantly leaving a hearing because he does not like the questions propounded to him—remedy by objection and refusal to answer both being open to him." (Italics added.)

In the case of *Hearst v. Black,* also cited by the Court in the *Barsky* case (*Hearst v. Black,* 87 F. (2d) 68 at pages 71 and 72), the Court stated:

"The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. *On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference. The Constitution has lodged the legislative power exclusively in the Congress.* If a court could say to the Congress that it could use or could not use information in

its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. *Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others. 'This separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism.'* Springer v. Philippine Islands, 277 U.S. 189, 201, 48 S.Ct. 480, 482, 72 L.Ed. 845." (Italics added.)

Among the cases relied upon by the Court in the *Hearst* case was the case of *Alpers v. City and County of San Francisco*, 32 Fed. 503, 506 (Circuit Court, Northern District, California, 1887) in which in an opinion by Circuit Justice Field it was stated:

"The difficulty presented in the case before us is that the application to enjoin the passage of any resolution, order, or ordinance, which may tend to impair the obligation of the contract, is an application to enjoin a legislative body from the exercise of legislative power, and to enjoin the exercise of such power is not within the jurisdiction of a court of equity. This no one will question as applied to the power of the legislature of the state. *The suggestion of any such jurisdiction of the court over that body would not be entertained for a moment. The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends.* Municipal corporations are instrumentalities of the state for the more convenient adminis-

tration of local affairs, and for that purpose are invested with certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary." (Italics added.)

Another case relied upon by the Court in the *Hearst* case was the case of *New Orleans Water Works Co. v. City of New Orleans,* 164 U.S. 471, in which it was stated in an opinion by Justice Harlan:

"If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a

municipal body while it is in the exercise of powers that are legislative in their character. *It ought not to attempt to do indirectly what it could not do directly.* In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption."

The Court in the *Barsky* case also relied upon the historical case of *McGrain v. Daugherty*, 273 U.S. 135.

At page 175 the Court clearly held that even the abusive and oppressive use of the power of inquiry by a Congressional Committee affords no ground for denying the power and that the relief to be afforded an individual who is subject to such oppressive and abusive use of the power consists of the right to refuse to answer such questions or to the right of writ of habeas corpus if he is incarcerated for refusing to do so. The Court stated in this connection:

"The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and

> of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and In Re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

In the *McGrain v. Daugherty* case the Court cited as one of the authorities the case of *Marshall v. Gordon*, 243 U.S. 521, where the Court in determining the extent of the legislative power to punish for contempt in a case which was similar to the one at bar inasmuch as it arose out of an irritating and ill-tempered statement addressed to Congress in a letter, the Court stated with respect to the power of Congress to punish for a contempt for an obstruction of the exercise of the legislative power:

> "And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

The decisions cited and quoted above are founded upon and are applications of the rule prevailing with

respect to the legislative enactments, for it has been held without exception that the judiciary cannot inquire into the motives of the legislature in the enactment of legislation.

14 *Am. Jur.* 399;

11 *Am. Jur.* 818;

1 *Cooley's Constitutional Limitations,* 8th Ed. 379.

The following language from the opinion of Chief Justice White in *McCray v. United States,* 195 U.S. 27, 54, is quoted with approval by Cooley:

> "It is * * * argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department. The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end

> to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. * * * It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

The Supreme Court of the United States has not distinguished between Congress or the legislative bodies of the respective states of the Union in refusing to consider the wisdom, need and appropriateness of legislation or the motives of the legislature in the passage of laws.

Olsen v. State of Nebraska, 313 U.S. 236;
Amy v. City of Watertown, 130 U.S. 301;
Soon Hing v. Crowley, 113 U.S. 703;
New Orleans v. Warner, 175 U.S. 120;
Sonzinsky v. United States, 300 U.S. 506;
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381;
Mulford v. Smith, 307 U.S. 38.

The Court of Appeals for the Ninth Circuit has also followed this general rule in the case of *Allen v. Markham,* 156 Fed. (2d) 653, 660.

It thus seems to be clearly established that the Federal Courts do not have the power to inquire into the motives of the legislative departments of the Federal or of the State governments; that the power of the Court in this case can be no greater than the power of the Courts to inquire into the motives of the Congressional Committees for the only justification for such inquiry would be the application of the provisions of the First Amendment to the Constitution of the United States in the one case directly and in the other case by virtue of the provisions of the Fourteenth Amendment and the Civil Rights Acts. The Fourteenth Amendment and Civil Rights Acts can do no more than apply the provisions of the First Amendment to the acts of the State. It is apparent from the foregoing authorities that the fundamental requirement of a separation of powers has precluded the inquiry by the judiciary into the motives of the legislative branch of the government.

The *Eisler* case and the *Barsky* case hold flatly that the judicial power may not be used to scrutinize the motives of the committee upon an attack almost identical with the one made here.

The Court of Appeals here has held that the action of a legislative committee, making legitimate use of the power conferred upon it, may become unlawful by scrutinizing and inquiring into the motive actuating the Committee in the performance of its acts.

Thus the holding here is in direct conflict with the holding in the cases cited.

The purpose of the investigation of un-American activities of necessity involves freedom of the press, freedom of speech, freedom of assembly. When the speech and the writing and the assemblage of people engaged in un-American activities are hereafter to be the subject matter of an investigation by a lawfully constituted committee, exercising constitutional powers to do such investigating, those investigating may, under the decision of the Court of Appeals in this case, face a claim for damages under the Civil Rights Acts upon the bare declaration that the act committed is in reprisal for having exercised free speech, freedom of the press, and the freedom to assemble and that the act was actuated by malice. The holding of the Court of Appeals that the motives which prompt a legislative body, acting through a committee (but why not the Legislature itself), may be scrutinized by the judicial branch of the government is not within the power of a Court under a republican form of government.

The decision of the Court of Appeals passes this point, that goes to a "basic and vital" power of a legislature to act independently of the judiciary on matters within the scope of the legislature's power, without discussion or even comment.

We respectfully urge that the legislature of the State of California is entitled to have this point determined. It is vital to its own existence.

Incidental to this subject, the holding of the Court of Appeals above discussed completely ignores the fundamental rule in civil law, namely, that well-expressed rule in the following quotation from 54 *C.J.S.* 915:

> "Malice in law exists where a wrongful act is intentionally done without just cause or excuse, but since malice in law is predicated on the doing of an unlawful act or the doing of a lawful act in an unlawful manner, it cannot exist where the thing done is lawful and the means employed are lawful."

B.

THE RIGHT CLAIMED BY RESPONDENT TO BE INVADED WAS "THE RIGHT TO PETITION THE LEGISLATURE".

The complaint unequivocally alleges that the act done by respondent (and the right claimed to have been infringed) was the circulation of a petition among the Legislators of the State of California.

The right to petition the government for a redress of grievances is a separately stated right under the First Amendment of the Constitution of the United States, which reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The right becomes a separate section of the Constitution of the State of California.

Article I, Sec. 9 of the Constitution of the State of California provides:

"Liberty of Speech and of the Press.

Sec. 9. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *"

Article I, Sec. 10 of the Constitution of the State of California provides:

"Right to Assemble and to Petition.

Sec. 10. The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances."

The right to petition is distinct and separate from the right to assemble.

The complaint in the instant case uses the phrases, "Freedom of Speech," "Equal Protection of the Law," "Due Process of the Law," "Infringement of Equal Privileges," and "Immunity as a Citizen of the United States," but the act done claimed to have been infringed is specifically charged as the act of petitioning the Legislature of the State of California on a matter completely unrelated to the Federal government and relating solely to a matter of legislative concern and particularly the internal organization and procedure of the Legislature in this, whether it should

by appropriation continue the existence of the Committee on un-American activities. This right the Court of Appeals held in its opinion had actually been exercised by respondent.

C.

RIGHT TO PETITION THE CALIFORNIA LEGISLATURE IS NOT ONE SECURED TO RESPONDENT BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

Although the right to petition the government is a fundamental one it is a right limited to the "citizen" not the individual. It is a fundamental right not conferred by either the Constitution of the United States or of the State of California but rather secured to the citizens of each sovereign by the Constitutions thereof.

United States v. Cruikshank, 92 U.S. 542, 552.

Being an attribute of "citizenship" it necessarily follows that the right of a citizen of the United States to petition his *government* differs from the right of a citizen of the State of California to petition *the legislature*.

Hence the right of a citizen of California to petition the State Legislature is not one secured to him by the Constitution or laws of the United States and is subject only to State jurisdiction.

United States v. Cruikshank, supra, p. 551.

It is only the right to petition the United States Government which being an attribute of national

citizenship is secured and protected by the Constitution of the United States.

United States v. Cruikshank, supra.

See, also;

Crandall v. State of Nevada, 73 U.S. 35, 44.

There is nothing to the contrary to be found in *Hague v. Committee for Industrial Organization*, 307 U.S. 496, for there the assemblies sought to be eliminated were for the purpose of discussing National rather than State legislation.

> "The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment by Section 1 of the Fourteenth Amendment; and whether R.S. Sec. 1979 and Section 24(14) of the Judicial Code afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge."

We respectfully submit that the present decision is in conflict with the reasoning, holding and cases cited by the same Court of Appeals in its opinion in *Hardyman et al. v. Collins et al.*, 183 F. (2d) 308, decided May 29, 1950, which is bottomed upon the proposition that the meeting involved was for the purpose of petitioning the Federal government on matters of Federal concern.

The Fourteenth Amendment is the Constitutional authority for the Civil Rights Acts; the extent of their application is limited by the scope of the Amendment.

United States v. Cruikshank, supra.

Not only is the right to petition the State Legislature not one of the rights set out in the Bill of Rights, but it is also true that the due process clause of the Fourteenth Amendment did not require the State to give to its citizens all the rights secured to the citizen of the United States by the Bill of Rights.

These rights are many, here are a few:

Right to trial by jury in a State Court. *Tompsett v. State of Ohio,* 146 F. (2d) 95.

Freedom from unreasonable searches and seizures. *United States v. Crosby,* 1 Hughes 448, Fed. case No. 14,893.

Right to indictment by Grand Jury. *Maxwell v. Dow,* 176 U.S. 581.

Prohibition against self-incrimination. *Adamson v. California,* 332 U.S. 46.

Right to be charged by indictment in felony cases. *Hurtado v. California,* 110 U.S. 516.

The political relation between the State and its citizens is free from federal interference. Such freedom is essential in preserving the balance between the national and state power. As stated in the *Adamson* case, supra, at pages 1677 and 1678:

"The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of

the individual against the federal government and its provisions were inapplicable to similar actions done by the states. Barron v. Baltimore, 7 Pet. 243, 8 L.Ed. 672; Feldman v. United States, 322 U.S. 487, 490, 64 S.Ct. 1082, 1283, 88 L.Ed. 1408, 154 A.L.R. 982. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence, secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The Slaughter-House cases decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. Maxwell v. Bugbee, 250 U.S. 525, 537, 40 S.Ct. 2, 5, 63 L.Ed. 1124; Hamilton v. Regents, 293 U.S. 245, 261, 55 S.Ct. 197, 203, 79 L.Ed. 343. This power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in Twining v. New Jersey, 211 U.S. 78, 91-98, 29 S.Ct. 14, 16-19, 53 L.Ed. 97. 'The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state.' The Twining case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the

national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. Twining v. New Jersey, supra, 211 U.S. at pages 98, 99, 29 S. Ct. at page 19, 53 L.Ed. 97; Palko v. Connecticut, supra, 302 U.S. at page 328, 58 S.Ct. at page 153, 82 L.Ed. 288. After declaring that state and national citizenship co-exist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power."

Except as limited by the Fifteenth Amendment the State has complete power over suffrage. As stated in *Guinn v. United States*, 238 U.S. 347:

"Beyond doubt the Amendment does not take away from the state governments in a general

sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

cf. *Breedlove v. Suttles,* 302 U.S. 277.

The cases dealing with national as contrasted with State elections should not be confused. Those involve an entirely different principle, namely, that the federal government has exclusive control, should it choose to exercise it, over the relation between the federal government and its citizens which it may protect from state interference.

Likewise the right to become a candidate for a state office is a right or privilege of state not national citizenship and is not secured a person by the Constitution of the United States.

Snowden v. Hughes, 321 U.S. 1.

It will be observed that the present case was cited without even a reference to the principles of law above discussed.

D.

THE STATE LEGISLATORS OF CALIFORNIA ARE EXEMPT FROM CIVIL LIABILITY.

Section 4 of Article IV of the Constitution provides, among other things, as follows:

> "The United States shall guarantee to every state in this Union a republican form of government * * *."

As part of a republican form of government it is unquestioned "that all of the powers entrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative and the judicial." The privileges secured to members of the legislative body, both state and federal, by which they are exempt from civil responsibility for their acts, resulting from the nature and in the execution of their office, are definite and positive. The leading case on this subject is *Kilbourn v. Thompson,* 103 U.S. 168. The discussion on this interesting subject starts on page 201. In reading this case, we suggest that the language of Mr. Chief Justice Parsons, quoted with approval, be considered. Again with approval, the Supreme Court quotes the following:

> "Mr. Justice Story (sec. 866 of his Commentaries on the Constitution) says: 'The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as matter of constitutional right.'"

See also:

Collins v. Riley, 24 Cal. (2d) 912, 915;
Ex parte McCarthy, 29 Cal. 395;
Hearst v. Black, supra;
United States v. Bryan, 72 F. Supp. 58;
Cochran v. Couzens, 42 F. (2d) 783;
Spalding v. Vilas, 161 U.S. 483;
2 Cooley's Constitutional Limitations, 8th Edition, 929;
Cushing, Law and Practice of Legislative Assemblies, Sec. 5602.

We urge to the Court:

1. That a member of the State Legislature of California is immune from civil liability for acts done during the performance of his legislative duty.

2. That when it is determined that the meeting was within the power of the Committee to call and that the subpoenaing of respondent was within its power, state legislators are immune from civil liability for their acts during the course of the meetings lawfully held.

3. That the right of respondent stems from a statute; the immunity of the Legislature stems from the Constitution. Under these circumstances the constitutional rights of the legislators are paramount.

4. That a construction of the Civil Rights Act as paramount to the right of members of the State Legislature implicit in a Republican form of government and also derived from the Constitution of the United States is unconstitutional and void.

E.

CONCLUSION.

Fundamental and vital legal questions are involved in this petition for writ of certiorari. A decision with respect to them was implicit in the judgment of the Court of Appeals although none of them were even referred to in the opinion much less discussed or expressly recited, namely:

1. The judiciary has not the power to inquire into the motives of the legislative branch of the government.

2. The right to petition to the California Legislature is not one secured to either a citizen of the United States, a citizen of the State of California or a person within the jurisdiction of the United States by the Constitution or laws of the United States.

3. State Legislatures are immune from civil liability under the provisions of Sections 43 and 47(3) Title 8 U.S.C.A.

The impact of the judgment of the Court of Appeals upon the Legislature of the State of California and the legislative bodies of every other state of the Union is obvious. The questions decided by the Court of Appeals in this case cannot help but have a serious effect on the right of the people to elect representatives and the right of the people to expect their elected legislative representatives to execute the functions of their office and it cannot help but deter the legislative representatives of the people in the State of California

and the other states of the Union in the execution of the functions of their office for they cannot act without fear of civil prosecution at the very least at the hands and at the instigation of every malcontent.

The Court of Appeals has decided that the motives prompting lawful acts of State Legislators acting as such may be inquired into by the judiciary. The authorities seemed uniform to the contrary until this decision.

For the foregoing reasons, it is respectfully submitted that the writ should issue.

Dated, San Francisco, California,
September 25, 1950.

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